U.S. Department of Labor

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Issue date: 23May2002

Case No: 2001-LHC-2606

OWCP No: 5-98779

In the Matter of:

JAMES H. TAYLOR,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Employer.

Appearances:

John H. Klein, Esq.
For Claimant

James M. Mesnard, Esq.
For Employer

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim filed by James H. Taylor ("Claimant") against Newport News Shipbuilding and Dry Dock Company ("Employer") for benefits under the Longshore and Harbor Workers' Compensation Act ("the act") as amended, 33 U.S.C. 901 et seq. Claimant seeks payment of benefits that Employer withheld as a "credit" taken for annual leave benefits that it allegedly paid to Claimant by mistake. Claimant also argues that his wage earning capacity should be calculated based on his current twenty-four hour per week job. Employer responds that it was entitled to take a credit for the erroneously paid annual leave. Employer also argues that Claimant's wage earnings since leaving Employer are significantly below his actual earning capacity because there are jobs available to Claimant that would allow him to work forty hours per week. Employer argues

that it has shown that Claimant had a greater earning capacity as of December 1, 1999 and that Employer is entitled to reduce his compensation from that date forward. The Director originally argued that Employer was not entitled to special fund relief pursuant to section 8(f) of the act but later indicated in a letter dated April 26, 2002 that Employer's petition for special fund relief would not be opposed.

A formal hearing was held before me at Newport News, Virginia on October 1, 2001 at which both parties were afforded a full opportunity to present evidence and argument as provided for by law and regulations. Claimant offered exhibits CX 1-CX 4 and Employer offered EX 1-EX 32.[1] Without objection, all were received into evidence (Tr. 12-4). At the hearing, the parties by their counsel indicated that they had not been able to agree on an average weekly wage and that they wished the case to be continued in order to adequately address that issue. A supplemental hearing was scheduled for February 25, 2002. However, in a conference call, the parties stipulated to the average weekly wage, and the supplemental hearing was canceled. Subsequent to the hearing, Claimant offered CX 5-CX 8, and Employer offered EX 33-EX 34. Without objection, all are received into evidence.

The findings and conclusions that follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties stipulated to and I find as follows:

1. That the parties are subject to the act;

2. That Claimant and Employer were at all relevant times in an employee/employer relationship;

3. That on January 11, 1996, Claimant suffered an injury arising out of and in the course of his employment with the shipyard;

4. That all notices, claims and reports that were required to be made or given

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[1] The following are references to the record:
CX - Claimant's exhibit
EX - Employer's exhibit
Tr. - Transcript of hearing

were in fact made or given in a timely fashion;

5. That Claimant's average weekly wage on the date of injury was $606.65, which yields a compensation rate of $404.43.

(Tr. 8-10, CX 5).

ISSUES

1. What is Claimant's wage-earning capacity?

2. Was Employer entitled to deduct its alleged overpayment of annual leave from compensation that was due to Claimant under the act?

FINDINGS OF FACT

Claimant, a forty-seven year old high school graduate, worked at the shipyard as a chipper from November 9, 1977 until January 11, 1996 (Tr. 15-6). His work required him to use heavy tools including a chipping hammer and a grinder (Tr. 16). In 1994, he underwent several knee surgeries but returned to work (Tr. 16). As he worked, he sat on a bucket in order to relieve his knee, requiring him to work in "an awkward position" (Tr. 17). One day, while he was sitting on the bucket and working, he "felt something pull in [his] back,. . .heard a pop, and from there, it was great pain" (Tr. 17).

Claimant reported the pain to his supervisor and was treated in the shipyard clinic. Claimant received further treatment from Dr. Stiles. On September 16, 1997, Dr. Stiles assigned temporary restrictions of no vertical or inclined ladders, no crawling or kneeling, occasional squatting, no lifting of over ten pounds, and no use of stairs except to and from the job site. Dr. Stiles also noted that Claimant could walk for 200 yards and needed transportation to and from the worksite (EX 18, p. 85; Tr. 18). Dr. Stiles attributed the restrictions to both the knee and back injuries (EX 18, p. 85). The shipyard was not able to give Claimant work within these restrictions (Tr. 18; EX 17, p. 65). On October 29, 1997, Dr. Stiles made the restrictions permanent (EX 18, p. 86).

Claimant went to the Office of Workers' Compensation Programs (OWCP) of the United States Department of Labor (Tr. 18, CX 1). Working with his vocational counselor, Claimant found a part-time job as a security guard at Devonshire Retirement Community, a job he continues to hold (Tr. 21; CX 1b). He was hired to work twenty-four

hours per week at a rate of $5.50 per hour and began the job on October 20, 1997 (Tr. 19, CX 1b). He continues to work less than full time at the Devonshire. However, on a few isolated occasions, he has filled in for his supervisor and has worked full-time plus overtime (Tr. 39, EX 28). At the time of the hearing, his hourly wage in 2001 dollars was $7.70 per hour (Tr. 27)

On January 8, 1998, several months after beginning the Devonshire job, Claimant indicated to his counselor that he was still interested in searching for full-time employment (CX 1c). However, according to Claimant's testimony at the hearing, he did not make any effort to find a full-time job from the time he began at the Devonshire until a week before the hearing (Tr. 21). His relationship with OWCP terminated on June 9, 1998 (CX 1f).

In the two-week pay period ending September 26, 1998, Claimant worked 98.7 hours, including 18.7 hours of overtime. In the period ending October 26, 1998, Claimant worked 75.59 hours (EX 28). When questioned about these periods, Claimant stated that he was not receiving his workers' compensation check at this time. Therefore, he requested and was given more hours to work (Tr. 39). Employer's counsel questioned whether Claimant could request to work overtime. Claimant responded: "It's not that easy because we don't have anything like that. It's not that open" (Tr. 40). Claimant acknowledged that he was capable of working a forty-hour week if the job fit the restrictions issued by Dr. Stiles (Tr. 53).

A labor-market survey dated August 10, 1999 by vocational consultant Gary Klein identified six full-time jobs that were hiring at that time, paying between $5.25 and $8.46 per hour (EX 25). Dr. Stiles approved the jobs as within Claimant's medical restrictions (EX 26).

William Kay, Employer's vocational rehabilitation consultant in this case, has a bachelor's degree in psychology and thirty-one years of experience in the field of vocational rehabilitation (Tr. 49-51). Kay conducted an additional labor market survey on or about September 13, 2001 (EX 27). He did not meet with Claimant but relied on information provided in the previous labor-market survey (Tr. 53). The survey identified four full-time jobs in the security field that were available during the relevant period (EX 27, pp. 13-5). The employers were Globe Aviation, Wackenhut Corporation, James/York Security, and Security Services of America (EX 27, p. 1). All of the employers hired full time employees during the relevant period (EX 27, p. 1).

Kay believed that the jobs were within Claimant's restrictions (Tr. 55-7). None of the jobs required stooping, kneeling, crawling or climbing vertical ladders (EX 27, pp. 13-5). Three of the jobs did not require stair climbing, but the Wackenhut Security people indicated that stair climbing might be required depending on the site (EX 27, p. 15). The job with Globe Aviation required walking as needed, up to one hour in an eight hour shift

(EX 27, p. 12). James/York allowed employees to alternate standing, sitting, and walking as needed (EX 27, p. 13). The other positions required walking "as needed," but the descriptions indicated that the employee would primarily be seated (EX 27, pp. 13, 15).

The employers payed between $5.50 and $6.25 per hour to start (EX 27, pp. 12-5). Globe Aviation and Wackenhut had positions available for forty hours per week during the relevant time period (EX 27, p. 1). James/York hired employees for forty hours per week, although they might cut hours "during the slack season," which occurred in winter (Tr. 56). Security Services of America normally hired for thirty-two to thirty-five hours per week but would provide more hours if the employee requested them (EX 27, p. 1). Kay indicated that Claimant's present earning capacity in these jobs was $240.00 per week, based on $6.00 per hour over a forty hour week (Tr. 57). Kay opined that this amount should be converted to 1996 dollars in order to accurately reflect the difference between Claimant's average weekly wage and his current earning capacity (Tr. 58). Kay determined that Claimant's earning capacity in 1996 dollars was $210.00 per week. He concluded this by calculating the change in minimum wage between 1996 and 1999 and applying this ratio to Claimant's projected wages (Tr. 59).

In May 2000, Claimant received a check from Employer. Claimant testified that the check was for $1,457.90 (Tr. 23). Employer contends that the check was an erroneous payment of annual leave to which Claimant was not entitled, a net payment of $2,608.94 (EX 13, EX 16). Employer wrote to Claimant on March 23, 2001, requesting that the money be returned (EX 13). On April 11, 2001, Claimant wrote a check to Employer for $1,000 (EX 14). He sent it to Employer with a note stating that, although his lawyer told him he did not have to pay the money back, Claimant felt that he should pay back a portion (EX 15). Employer responded by informing Claimant that the $1,608.94 "balance due" would be taken out of his workers' compensation until it was paid (EX 16). Employer then withheld Claimant's entire payment for several weeks until the "balance" was paid off (Tr. 25).

DISCUSSION

I. Claimant's Wage-Earning Capacity

The parties agree that Claimant is unable to return to his pre-injury job. The burden now shifts to Employer to show the existence of realistic job opportunities which Claimant is capable of performing, considering his age, education, work experience, and physical restrictions. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer must establish the precise nature and terms of job

opportunities that it contends constitute suitable alternative employment in order for me to determine rationally whether Claimant is physically and mentally capable of performing the work that is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). Under case law in the Fourth Circuit, Employer must show the availability of a range of jobs. Lentz v. The Cottman Company, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988).

Section 8(h) of the act, 33 U.S.C. §908(h), provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. See Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); Randall v. Comfort Control, Inc., 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). In determining whether the employee's actual post-injury wages fairly and reasonably represent his wage-earning capacity, relevant considerations include the employee's physical condition, age, education, industrial history, and availability of employment which he can perform post-injury. Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 776 F.2d 1225,18 BRBS 12 (CRT)(4th Cir. 1985), aff'g 16 BRBS 282 (1984); Randall, supra, 725 F.2d at 791, 16 BRBS at 56 (CRT); Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 660 (1979).

In the instant case, Claimant has been employed in part-time work since October 20, 1997, usually working twenty-four hours per week. Employer has produced two labor-market surveys which show a total of nine full-time positions within Claimant's restrictions which were available during the relevant period[2] (EX 25, EX 27). This showing clearly satisfies Employer's burden to show suitable alternative employment and to show that Claimant's actual wages as a part-time worker do not reflect his wage-earning capacity.

A claimant can rebut an employer's showing of the availability of suitable alternative employment and retain eligibility for total disability benefits if he shows that he diligently pursued alternative employment opportunities but was unable to secure a position. Newport News Shipbuilding & Dry Dock Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), cert. denied, 479 U.S. 826 (1986). By Claimant's own admission, he did not look for employment for four years between being his hiring at the Devonshire and the week before the hearing (Tr. 21). Claimant further testified that, when his compensation was cut off briefly, he requested and received additional hours from the Devonshire (Tr. 39). Although he testified that he could not request and receive additional hours on every occasion, it appears that Claimant was generally content to accept his compensation rather than pursuing additional hours. Based on these facts, I agree with Employer's conclusion that Claimant did not diligently seek full time work elsewhere or even additional hours at the Devonshire.

Employer has argued that Claimant's compensation should be based on a wage-earning capacity of $240.00 per week, effective December 1, 1999 (Employer's brief, p.

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[2] Because it is not clear whether the Wackenhut Security job falls within Claimant's restrictions regarding stair-climbing, I have excluded it from consideration.

19).[3] Employer correctly acknowledges that this figure should be adjusted to reflect the effects of inflation between 1996 and 2001 (Employer's brief, p. 18).[4] However, Kay's method of adjusting the wages by considering the difference in minimum wage between 1996 and the present is not the method preferred by the Benefits Review Board ("the Board"). The Board has held that the percentage increase in the national average weekly wage should be applied to adjust post-injury wages downward. Richardson v. General dynamics Corp., 23 BRBS 327, 330-1 (1990).

In the instant case, the national average weekly wage has changed from $391.22 in January 1996 to $466.91 in September 2001. National Average Weekly Wage (NAWW), http://www.dolo.gov/dol/esa/public/regs/compliance/owcp/NAWWinfo.htm. According to this ratio, the adjusted value of Claimant's current wage-earning capacity is $201.09.[5] Claimant's compensation rate is derived by subtracting the adjusted wage-earning capacity from Claimant's average weekly wage and multiplying by two-thirds. Therefore:

($606.65 - $201.09) x 2/3 = $270.37.

II. Credit for Overpayment of Annual Leave

Employer argues that it properly used its overpayment of annual leave as a credit against Claimant's workers' compensation. This position is not supported by the plain language of the statute. Section 14(j) of the act states:

> (j) Reimbursement for advance payments. If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due. 33. U.S.C. 914(j).

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[3] In fact, the first labor-market survey indicates that suitable full-time employment was available to Claimant at up to $8.46 per hour on August 10, 1999 (EX 25). However, I will not grant relief that Employer has not requested.

[4] Although suitable alternative employment was shown to be available in 1999, Kay testified that $240.00 was Claimant's earning capacity based on the September 13, 2001 labor-market survey (Tr. 57).

[5] I arrived at the compensation rate by use of the following proportion:

$$\frac{\text{National Average Weekly Wage as ofdate of injury (January 11, 1996 ($391.22)}}{\text{National Average Weekly Wage as of September 13, 2001 labor-market survey ($466.91)}} = \frac{\text{Claimant's weekly earning capacity in 1996 dollars ($201.09)}}{\text{Claimant's weekly earning capacity 2001 dollars ($240.00)}}$$

Section 2(12) of the act defines “compensation” as follows:

> (12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.
>
> 33 U.S.C. 2(12).

The Board has consistently read these sections together to mean that an employer can only receive a credit for previous payments that were intended as “advance payment of compensation.” Mijangos v. Avondale Shipyard, 19 BRBS 15, 21(1986), Van Dyke v. Newport News Shipbuilding, 8 BRBS 388, 396 (1978). In this case, Employer has stated quite unequivocally that the payment in question was not intended as an advance payment of compensation but was an erroneous payment of annual leave (EX 13, EX 16). Therefore, Employer was not entitled to use this payment as a credit against Claimant’s workers’ compensation benefits.[6] Therefore, Employer must reimburse Claimant for the withheld compensation or face penalties under section 14(f). 33 U.S.C. 914(f).

ORDER

It is hereby ORDERED that:

1. Employer shall pay Claimant permanent partial disability compensation at a rate of $390.23 per week[7] for the period from October 28, 1997 to November 30, 1999.

2. Employer shall pay Claimant permanent partial disability compensation at a rate of $270.37 per week for the period from December 1, 1999 to the present and continuing.

3. At the expiration of 104 weeks after October 28, 1997, such compensation shall

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[6] In addition, I note that the amount that Claimant received from Employer is in dispute (Tr. 23, EX 13). Such a factual dispute between an employer and an employee regarding payments unrelated to workers’ compensation is not within my jurisdiction. See Temporary Employment Services, Inc., et al v. Trinity Marine Group, Inc., __ F.3d ___ (5th Cir. 2001), 35 BRBS 92 (CRT) (Aug. 7, 2001) (holding, in an analogous case, that a state law breach of contract claim between an insurer and its insured is beyond the jurisdictional reach of the act).

[7] This amount reflects the permanent partial disability payments that Employer actually made during this period, according to an updated summary of payments submitted by Employer (EX 9).

be paid by the special fund established pursuant to 33 U.S.C. 944. Any overpayment shall be reimbursed to Employer by the special fund with interest at the treasury-bill rate.

4. Employer shall pay Claimant $1608.94 that was withheld in 2001 as a purported credit for overpayment of annual leave.

5. Employer shall pay interest at the treasury-bill rate specified in 28 U.S.C. 1961 in effect when this decision and order is filed with the Office of the District Director on all accrued unpaid benefits, if any, computed from the date on which each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

6. Employer shall receive credit for any compensation previously paid to Claimant for the period and injury in question.

7. Within thirty (30) days of receipt of this decision and order, Claimant's attorney shall file a copy of a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel, who shall then have twenty days to respond thereto.

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FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/cmp
Newport News, Virginia